

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

DePUY MITEK, INC.,  
Plaintiff,

v.

ARTHREX, INC. and  
PEARSALLS LTD.  
Defendants.

CIVIL ACTION NO. 04-12457-PBS

**ORDER**

January 31, 2007

Saris, U.S.D.J.

1. Plaintiff's motion to strike hearsay exhibit is **ALLOWED**.  
(Docket No. 58).

2. Plaintiff's motion for summary judgment on defendants' claim of inequitable conduct is **DENIED**. (Docket No. 36)


3. Defendants' motion for summary judgment of invalidity based on anticipation is **DENIED**. (Docket No. 39)

4. DePuy Mitek's motion to strike Dr. Mukherjee's declarations and exhibits is **ALLOWED** (Docket No. 78).

5. The Court **ALLOWS** DePuy Mitek's motion to strike Arthrex's reliance on its own interrogatory contentions but **DENIES** the motion to strike Dr. Mukherjee's TigerWire opinions. (Docket No. 69). The denial of the portion of the motion dealing with Dr. Mukherjee's opinion is without prejudice because the factual record is insufficient to render a determination on this highly

disputed Daubert issue. It is unfortunate that both parties seek to litigate these issues which bear on infringement through motions to strike which are hard to follow and appear to be an end-run on the page limits for summary judgment briefing. The bottom line is that the Court does not have an adequate or clear record for ruling on cross-motions for summary judgment under the claim construction determined after the Markman hearing.

6. The Court will **ALLOW** Arthrex to supplement its expert report, but only to the extent necessary to correct typographical and/or computation errors unrelated to the computer virus. DePuy Mitek may take the expert's deposition (not to exceed four hours) concerning any supplementation and DePuy Mitek may seek attorneys fees for one attorney. If DePuy Mitek supplements its expert reports in response, Arthrex has no right to re-depose the experts. (Docket No. 91).

  
PATTI B. SARIS  
United States District Judge